# *UTI LEGASSIT*

By W. H. Kirk

The fact that the Roman jurists were not in the habit of going back of the *Twelve Tables* sufficiently explains why they found the base of testamentary succession in *Twelve Tables* v. 3, "uti legassit suae rei ita ius esto." Modern writers agree that the wills made *calatis comitiis* and *in procinctu* were older than the code; they disagree as to the purpose of this clause, which does not implicitly recognize an existing institution (as the ancient right of the *suus heres* is recognized in v. 4, "si intestato moritur cui suus heres nec escit"), but enacts a new rule.

One view is thus expressed by Girard, *Droit romain*, page 804:

> C'est une disposition qui a établi la liberté dans le testament primitivement soumis au contrôle des comices. . . . . Antérieurement c'était le peuple qui *legabat*, qui *legem dicebat* sur la *res* du testateur. . . . . Désormais c'est le testateur qui fait sur tout cela une *lex* dont la soumission au peuple n'est plus que de pure forme.

One objection to this I find in the word by which "having made no will" is expressed in v. 4. If in 450 B.C. *legare* was the technical term for "make a will," and if down to that year the act was regarded as a *lex*, not as a *testamentum*, some form of *lex* or *legare* with a negative might be expected in place of *intestato*. That compound cannot have been used in this sense until *testari* was well established as the technical term for the act in question and therefore not until the assembled citizens had come to be regarded as mere witnesses. Its employment in the *Twelve Tables* proves that the will, if it ever was an act of legislation, had ceased to be such long before the code was drawn up.

Another difficulty I find in the etymology attributed to *legare*. The derivation of this verb from *lex* is as old at least as Ulpian (*Reg.* 24.1) and has been repeated by many modern writers from Brisson down. But the primitive sense postulated by this derivation does not agree with the sense of the compounds. These all mean "send," *delegare* also "commit"—significations not easily or naturally

developed from an original *legem dicere.*[1] I have no other etymology to offer; but if, setting aside the question of derivation, we look only at the sense, it is, I think, possible to conclude that the uses of the simple verb and its compounds are consistent with the assumption of a *legare* originally synonymous with *mittere.*

The two verbs stand side by side in *Lex Iul. munic.* 150, "per legatos quos . . . . legarei mitti censuerint," as their derivatives do in Cic. *Verr.* iii. 73, "dimisso atque ablegato consilio." No doubt at this period the simple *legare* was already used only of sending in an official capacity, as in Sall. *Iug.* 21. 4 and 25. 4. There is apparently a contrast between an unofficial and an official negotiator in Cic. *Att.* x. 1. 4, "filium Brundisium de pace misit . . . . me legatum iri non arbitror"; *Fam.* iii. 8. 4, "privatae rei causa legari," seems to be ironical. The substantive *legatus* is like Gallo-Latin *missus;* Sall. *Iug.* 83. 1, "legatos ad Bocchum mittit," is paralleled by Greg. Tur. *H. Fr.* ii. 27, "missos ad regem dirigit," except that Gregory uses *mittere* as freely as *dirigere.* With a dative *legare* denotes "send for the benefit of" and consequently "appoint as aide to"; the primary sense, still distinguishable in *Manil.* 57, "ne legaretur A. Gabinius Cn. Pompeio" (Pompey was abroad and the appointment was to be made by the senate), is quite lost in *Fam.* vi. 6. 10, "Cassium sibi legavit."

In the private law of the same period *legare* is apparently a synonym of *dare: Lex Falcid.*, "ut eam pecuniam easque res quibusque dare legare volet," *ibid.*, "quibus quid ita datum legatumve erit"; and two centuries later Gaius, ii. 193, giving *do lego* as the formula for creating a legacy *per vindicationem,* adds: "sed et si alterum verbum positum sit, veluti 'do' aut 'lego,' aeque per vindicationem legatum est." That this was the oldest form of legacy seems proved (Karlowa, *Privatrecht,* p. 916) by the name *legatum,*[2] derived from this formula and extended to other bequests made by other words. The formula itself is evidently drawn from the *nuncupatio* of the testator who was making a will *per aes et libram,* Gai. ii. 104,

[1] Or *legem ferre,* as Jhering, *Geist d. röm. Rechts,* I, 146, interprets the verb. Vaničcek, *Etymol. Wörterb.*, gives as the primary meaning "etwas gesetzlich verfügen oder thun."

[2] Perhaps, also, by the fact that this form of legacy was confined to objects belonging to the testator *ex iure Quiritium* (Gai. ii. 196); the *Twelve Tables* said *suae rei.*

"ita do, ita lego, ita testor, itaque vos Quirites testimonium mihi perhibetote." But here the words *do* and *lego* cannot be synonyms, else we should have *ita do lego;* each of the clauses introduced by *ita* denotes a different act. What *lego* means, appears from Plaut. *Cas.* 100, "quin potius quod legatumst tibi negotium id curas?" cf. Cic. *Fam.* xiii. 26. 2, "quibus ea negotia mandavimus," Cael. *Fam.* viii. 1. 1, "hunc laborem alteri delegavi." Gaius in his account of the oral will *per aes et libram,* says ii. 102, "amico familiam suam . . . . mancipio dabat eumque rogabat quid cuique post mortem suam dari vellet, [103] familiae emptor . . . . heredis locum optinebat et ob id ei mandabat testator quid," etc. In the testator's *nuncupatio* the word *lego* corresponds to the *rogabat* and *mandabat* of Gaius. *Ita do,* "thus I give," expresses the conveyance of the property to the beneficiaries; *ita lego,* "thus I commit," expresses the charge laid upon the executor of consummating the conveyance; the execution of the will was a *negotium quod legatum fuit.* The verb *legare* has here, as in Plaut. *Cas. loc. cit.,* a sense belonging not to the simple *mittere,* but to its compound *committere* and to the compound *delegare.*

In the earlier, purely oral, will the executor was the *familiae emptor;* his formal appointment was made by the words which he himself uttered in effecting the mancipation, Gai. ii. 104, "familiam pecuniamque tuam endo mandatela tua custodelaque mea[1] *esse aio eaque,* quo tu iure testamentum facere possis secundum legem puplicam, hoc aere . . . . esto mihi empta." When the written will was introduced, the testator appointed the real executor by the words *ille heres esto.* Thus the commission which had previously been given to the *familiae emptor* was now given to the heir; the nuncupatory formula referred not to the preceding oral declarations, the fuller *nuncupatio* (Karlowa, p. 855, Girard, p. 809 n. 2), of the testator, but to the document which he exhibited to the witnesses. Into this document the words *do lego* were introduced, so that the

[1] This reading of Seckel and Kübler seems to me preferable to that of Krüger and Studemund, *endo mandatelam custodelamque meam.* But it is important to note that, as Girard says, "qu'on admette une restitution ou l'autre, la formule atteste toujours que le *familiae emptor* n'est pas destiné à conserver l'hérédité." Also with either reading the phrase constitutes, as Karlowa and Sohm both say, an acknowledgment by the *familiae emptor* that he is the mandatary of the testator.

vesting of title in beneficiaries other than the heir[1] was effected by the same words as before. It is probable that the word *lego* alike in the *nuncupatio* and in the *tabulae testamenti* was at first understood as referring to the heir; it may have been still so understood in the time of Plautus. When the verb had ceased to be used, as Plautus could still use it, in the sense of *mandare*, *do lego* became merely a traditional formula; finally the second verb was understood as synonymous with the first.

I have said that *ita do* expressed a conveyance of ownership to the beneficiaries; Maine, *Ancient Law*, chapter vi, and Sohm, *Institutes*, page 544 (Eng. tr.), call the *familiae emptor* owner of the estate which was mancipated to him. But the words *do* and *lego* can hardly have been used otherwise in the oral than in the written will; and in the latter they vested ownership in the legatee (Gai. ii. 194), not in the heir. Moreover the words of mancipation show that the *familiae emptor* did not become owner. In the mancipation of a child the purchaser and intending manumitter claimed the child as his (Gai. i. 119, "meum esse aio"); he had to acquire ownership, because he could not manumit or remancipate one who was not his own. But the *familiae emptor* claimed only that the estate was in his custody to act as the testator's agent[2] and make the latter's gift effective by conveying possession. The rule of the *Twelve Tables* vi. 1, "cum nexum faciet mancipiumque uti lingua nuncupassit ita ius esto," applies here. The law will recognize in the person receiving by mancipation ownership or merely custody, according as he claims the one or the other.

The comitial will and that made *in procinctu* were founded in ancient custom. The will *per aes et libram* (in its first form really an imperfect conveyance *inter vivos*, to be perfected, after the death of the conveyor, by his agent) must have been in its inception

[1] Of course the heir was at this time not necessarily a beneficiary; the *data legata* might include the whole property. Only if the testator instituted as heir a person whom he desired to benefit, would the latter be residuary legatee as well as executor.

[2] It is true that, as Sohm says, p. 543, "the mandatum and the transfer of ownership are not mutually incompatible"; they were combined in the *fideicommissum*. But if *do lego* had meant *Titio do, Titio lego reddat restituat* (Gai. ii. 250), the formula could not have given to the legatee a *rei vindicatio*, but only a personal action such as was given him by the words *heres meus dare damnas esto* (Gai. ii. 201, 204).

extra-legal. We need not suppose an *insignis quorundam perfidia* (*Inst.* ii. 23. 1; cf. Cic. *Fin.* ii. 55) to account for the fact that, being recognized as desirable, it was formally legalized; the question might well arise whether dispositions made by a man at the point of death should be allowed to defeat expectations based on the ancient rules of intestate succession. The code, by the clause *uti legassit*, decided the question in favor of the dying man; thereafter a decedent, when saying *ita lego*, felt assured that his mandate was legally valid.

There remains the question how this interpretation accords with the form in which Ulpian quotes *Twelve Tables* v. 3: "uti legassit super pecunia tutelave suae rei[1] ita ius esto." A guardian was appointed by the word *do* (Gai. i. 149), not *do lego* or *lego;* and it is not to be supposed that the *familiae emptor* any more than his successor, the heir, was charged with any responsibility in the matter. But compare Papin. *Dig.* xxvi. 2. 26. pr., "tutela communium liberorum matri testamento patris frustra mandatur," 28. pr., "qui tutelam testamento mandatam excusationis iure suscipere noluit," Ulp. *Dig.* xxvi. 7. 3. 3, "ei potissimum se tutelam commissurum praetor dicat cui testator delegavit." The formal acceptance of the mandate by the *familiae emptor* was an indispensable element in the making of a will by civil law; the *datio tutoris*, as a clause in the will, contained only the offer of a mandate which might or might not be accepted. But the guardianship was a *negotium mandatum, delegatum*, or, as Plautus has it, *legatum;* the clause *uti legassit* covered the case of both mandataries, of the one who declared his acceptance in presence of the testator, and of the one whose acceptance or refusal was formally signified only after the testator's death.

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[1] A double complement, prepositional phrase and legal genitive, as in *Lex Cornelia de sicariis:* "cui sorte obvenerit quaestio de sicariis eius quod in urbe . . . . factum erit."